## Jamilah bt Hj Ali & Anor v Bank Simpanan Nasional & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-184–09 OF 2018
SEE MEE CHUN J
28 NOVEMBER 2019

*Insurance — Duty of disclosure — Material non-disclosure — Insured declared herself to be of good health and free of illness at the time she filled proposal form to buy insurance cover — Insured in fact was undergoing medical treatment at material time for diabetes and hypertension and serious complications resulting from those conditions — Whether insurer entitled to avoid paying death benefits under policy due to non-disclosure of material facts*

The plaintiffs were, respectively, the mother and sister of a person ('the deceased') who had bought a house in respect of which the financing and mortgage reducing term takaful policy was provided by the first defendant ('BSN'). The takaful certificate was issued to the deceased by the second defendant ('D2'). Following the deceased's death from diabetes, the plaintiffs became owners of the house pursuant to a distribution order on the deceased's estate. Their claim was essentially against D2 for death benefits due to the deceased under the policy. D2 had rejected the claim for the benefits on the ground of non-disclosure of material facts by the deceased at the time she filled up the proposal form for the policy. In the form, the deceased had declared herself to be of good health and not suffering from any illness when, in fact, she was undergoing medical treatment at the time for high blood pressure and diabetes and serious complications resulting from those conditions.

**Held,** dismissing the plaintiffs' claim:

(1) The evidence showed that the deceased was suffering from and was being treated for diabetes and hypertension prior to her completion of the proposal form. Those facts were not disclosed, or were misrepresented, to D2 at the time the proposal form was completed. A contract of insurance, including takaful, was a contract of *uberrimae fidei* (of good faith) and any suppression or non-disclosure of material facts by the proposer would entitle the insurance company to avoid the contract. The non-disclosure of facts pertaining to her medical condition, coupled with the declaration that if she had not declared her state of health truthfully D2 had the right to cancel the takaful coverage, meant the takaful contract could be avoided (see paras 23, 27–28 & 31).

(2) The allegation that D2's asking for the medical records and information of the deceased after her death amounted to a new term of the contract

had no merit. D2's request for the records and information was merely to support its defence of non-disclosure. There was already a valid contract after the acceptance of the premium except that in this case, D2 sought to avoid the contract on the basis of material non-disclosure (see paras 32–33).

**[Bahasa Malaysia summary**

Plaintif-plaintif merupakan, ibu dan adik perempuan seorang individu ('si mati') yang telah membeli satu rumah yang mana polisi pembiayaan dan takaful berjangka mengurangkan gadai janji yang diperuntukkan oleh defendan pertama ('BSN'). Sijil takaful dikeluarkan kepada si mati oleh defendan kedua ('D2'). Selepas kematian si mati disebabkan oleh diabetes, plaintif-plaintif menjadi pemilik rumah tersebut selaras dengan perintah pembahagian harta pusaka si mati. Tuntutan mereka secara asasnya adalah terhadap D2 untuk faedah kematian di bawah polisi. D2 telah menolak tuntutan untuk faedah atas alasan ketidakdedahan fakta material oleh si mati pada masa dia mengisi borang cadangan untuk polisi tersebut. Dalam borang tersebut, si mati telah mengisytiharkan dirinya untuk berada dalam kesihatan yang baik dan tidak menghidapi apa-apa penyakit, walaupun fakta sebenarnya adalah dia sedang menjalani rawatan perubatan pada masa tersebut untuk darah tinggi dan diabetes dan komplikasi serius yang timbul daripada penyakit-penyakit tersebut.

**Diputuskan,** mengetepikan tuntutan plaintif:

(1) Keterangan menunjukan bahawa si mati menghidapi dan sedang dirawat untuk penyakit diabetes dan hipertensi sebelum beliau melengkapkan borang cadangan tersebut. Fakta tersebut tidak didedahkan, atau telah disalah nyatakan, kepada D2 pada masa borang cadangan tersebut dilengkapkan. Kontrak insurans, termasuk takaful, merupakan satu kontrak *uberrimae fidei* (dengan niat baik) dan apa-apa pencengkaman atau ketidakdedahan fakta material oleh pencadang akan memberi hak kepada syarikat insurans untuk mengelakkan kontrak tersebut. Ketidakdedahan fakta berkaitan dengan keadaan kesihatannya, berserta dengan pengisytiharan yang mana sekiranya dia tidak mendedahkan keadaan kesihatannya dengan benar D2 mempunyai hak untuk membatalkan liputan takaful tersebut, bermaksud kontrak takaful tersebut boleh dielakkan (lihat perenggan 23, 27–28 & 31).

(2) Dakwaan bahawa D2 memohon untuk rekod perubatan dan maklumat si mati selepas kematiannya terjumlah kepada satu terma kontrak baru tiada merit. Permohonan D2 untuk rekod dan maklumat tersebut hanya untuk menyokong pembelaan ketidakdedahanya. Ianya sudah menjadi kontrak yang sah selepas penerimaan premium kecuali dalam kes ini, D2 cuba untuk mengelak kontrak tersebut atas dasar ketidakdedahan material (lihat perenggan 32–33).]

**Cases referred to**

*Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740, HC (refd)
*Goh Chooi Leong v Public Life Assurance Co Ltd* [1964] 1 MLJ 5 (refd)
*National Insurance Co Ltd v S Joseph* [1973] 2 MLJ 195 (refd)
*Seah Cheoh Wah v Malayan Banking Bhd & Anor* [2014] 2 MLJcon 173; [2009] 7 CLJ 485, HC (refd)
*Tan Mooi Sim & Anor v United Overseas Bank (M) Bhd & Anor* [2011] 8 MLJ 556; [2011] 6 CLJ 937, HC (refd)
*United Oriental Assurance Sdn Bhd Kuantan v William Northey Mazzarol* [1984] 1 MLJ 260; [1984] 1 CLJ Rep 423, FC (refd)

*Ibrahim Haikal bin Razak (Haikal & Co) for the plaintiff.*
*Nurul Asyiqin Azman (Shahinuddin & Ranjit) for the first defendant.*
*Tan Si Xin (Azim, Tunku Farik & Wong) for the second defendant.*

**See Mee Chun J:**

INTRODUCTION

**[1]** Rubi bt Hazim ('the deceased') had purchased a house in Pasir Gudang ('property') where the property financing and mortgage reducing term takaful ('MRTT') policy was provided by the first defendant. The second defendant issued the takaful certificate No 40020004 (F/5–6) to the deceased under master certificate No MT006 (F/7–18) where the first defendant is named as the master policyholder.

**[2]** The plaintiffs claim is essentially against the second defendant for death benefits under the takaful certificate issued to the deceased.

**[3]** The deceased passed away on 26 January 2013 with the cause of death being diabetes (F/19).

LOCUS

**[4]** The plaintiffs claim is in their capacity as owners of the property. The first plaintiff is the mother, and the second plaintiff the sister, of the deceased. Although the locus of the plaintiffs to initiate the suit was disputed, it is the court's findng they have the locus being the owners of the property pursuant to the distribution order dated 16 June 2016 (C/tab M).

WITNESSES

**[5]** The witnesses for the plaintiffs were Chomil bt Hazim (PW1 and witness statement marked as WSP1) and Faridah bt Hazim (PW2 and witness statement marked as WSP2). The first plaintiff was PW2's mother and the second plaintiff the elder sister to PW2. The witnesses for the first defendant were Mohd Rizal bin Mohamad Aziz (DW1(D1)), Region Head, Retail Banking and witness statement marked as WSD1(D1) and Azrul bin Mohd Amin (DW2(D1)), Section Head of Credit Administration and witness statement marked as WSD2(D1). The witness for the second defendant was Kasthuri Dhevi Naidu (DW1 (D2)), Head of Claims and witness statement marked as (WSD1(D2)).

CLAIM

**[6]** The plaintiffs claim rests primarily on there being a valid takaful contract with the payment of the contribution of RM8,856 to the second defendant. The second defendant did not deny the receipt of payment but that there had been non-disclosure of facts.

**[7]** According to DW1 (second defendant) the claim for death benefits was rejected by the second defendant by letter dated 4 April 2014 (F/58–59) followed by another letter dated 5 May 2017 (F/61) maintaining its earlier rejection.

*Proposal form*

**[8]** Although there was some evidence from PW2 that the deceased did not sign the proposal form dated 26 December 2011, this appeared to be abandoned in the course of submission where the position was there had been a valid takaful contract. It stands to reason that the proposal form has to be valid for the takaful contract to in turn be valid if the plaintiffs claim is to succeed.

**[9]** In any event the proposal form is a Part A document. In para 5 of the plaintiffs' submission it was stated the second defendant received a proposal form signed by the deceased.

**[10]** It is the court's finding the proposal form in F/1–2 had been signed by the deceased.

*What was disclosed in the proposal form*

**[11]** The representative attending to the deceased was (Rizal, DW1(D1)) and he too signed on the form. In his witness statement he stated that based on the proposal form, the deceased did not state she had any illness (*penyakit*), the deceased was required to disclose if she was suffering from any illness which had been diagnosed or if she was undergoing treatment and there was no statement she was suffering from hypertension, hyperlipidemia and diabetes mellitus (paras 11–13). His supplementary evidence was that the proposal form, the offer letter for the financing and MRTT (D/Tab B) and quotation (E/3) were handed over to the deceased on 26 December 2011 (NOP/128).

**[12]** In cross-examination by the plaintiffs counsel, he agreed the relationship between him and the deceased was one of bank and customer but he was not an insurance agent (NOP/129). He disagreed the deceased signed the forms in the presence of PW2 (NOP/131–132). He agreed the particulars in the proposal form had to be explained to the deceased but disagreed he did not explain to the deceased or that the deceased only signed the form and he filled in the details (NOP/132).

**[13]** In re-examination he stated he was not an insurance agent to the customer as he was a staff of first defendant (NOP/142). He met the deceased twice, once on the bank loan and the second to explain the letter of offer, the approval and the quotation. The procedure was for the proposal form, letter of offer and quotation to be given to the deceased. He disagreed PW2 had been present at the signing of the proposal form as he does not know her (all in NOP/143). He disagreed he had not explained the terms and conditions in the proposal form as 'saya akan menjelaskan kepada si mati sebelum si mati turunkan tandatangan di surat proposal' and confirmed before the deceased signed he is required to explain to her (NOP/144). With regard to the proposal form he could confirm that which was his handwriting, that it was his handwriting in Part 1; Part 2 was that of another department and Part 3 was his, where 'Part 3 once I interview customer and I tick'. He agreed that he 'mengisi borang cadangan ini adalah berdasarkan kenyataan daripada si mati' (NOP/147).

**[14]** The evidence of Rizal as outlined above would show he explained the terms of the proposal form to the deceased before she signed it. In particular, Part 3 was ticked 'No' after he interviewed the deceased and was based on the statements from her. Further, one of the terms in the form was a health declaration as per para 5. All these had been explained to the deceased. There was no other evidence to suggest otherwise other than PW2's evidence that the deceased did not sign the proposal form which this court earlier found to be abandoned and cannot possibly hold due to the form being a Part A document.

**[15]** The significance of Part 3 and the health declaration which forms the thrust of second defendant's defence on non disclosed material facts will be seen as follows.

**[16]** Part 3 contained question 3.1 to which the deceased answered 'No' as ticked by Rizal. The question was:

> 3.1 Have you ever been diagnosed with or treated for or advised to seek treatment for a disease, injury, disability, physical deformity, or any condition related therefrom (such as but not limited to cardiovascular disease, stroke, high blood pressure, cancer, eye disease, disease of the liver, kidney(s), the digestive tract or the respiratory tract, thyroid or any other endocrine disorder, diabetes melitus, disease of the musculoskeletal system, neurological disorders, paralysis, mental or Plaintiffsychiatric disorders, tuberculosis, sexually transmitted disease and any disorder of the repductive organ, HIV/AIDS etc.) by a medical doctor/professional?

**[17]** In the proposal form the deceased also declared as follows:

> 5.1 Health Declaration: I hereby declare and confirm that I am in good physical and mental health and have not been advised or received any treatment for ANY major health diseases. I acknowledge that if I fail to declare truthfully, Prudential BSN Takaful Berhad (you) has the right to cancel the takaful coverage or reject my claims application.
>
> 5.2 I declare that the information given in this proposal and any information supplied to Prudential BSN Takaful Berhad (you), your representative or your Medical Examiner are true and that nothing material has been withheld. I understand that the information given in this proposal and any information as to health made to you or your Medical Examiner will be the basis of the contract (inclusive of the rates and terms to be applied) for this family takaful. I further declare that in the filling up, completing or answering of this proposal form:
>
> a. I have requested for and have been given the plan illustration in which all the contents, terms and conditions had been explained to my satisfaction.
>
> b. I am satisfied that this product will best serve my needs and that the proposed contribution amount under the proposal is an amount I can afford.

**[18]** On the day of oral reply on 19 September 2019, the court asked the following of the plaintiffs counsel:

> Qn Is it your submission that Rizal ticked and he ticked the wrong box ie Rubi said suffering from the diseases in 3.1 and Rizal ticked no.

PC Is a communication between Rizal and deceased and reasonable to assume that communication to agent is equivalent to communication to the company. No blame against the customer because they have done all that is required. I am not saying that Rubi said yes and Rizal said no.

**[19]** Counsel's response was in line with paras 16–20 of his written submission where he relied on *United Oriental Assurance Sdn Bhd Kuantan v William Northey Mazzarol* [1984] 1 MLJ 260; [1984] 1 CLJ Rep 423 where it was stated communication to the agent is equivalent to a communication to the insurance company's office.

**[20]** In the first instance it has to be established what is it that was communicated to Rizal. Here the evidence from Rizal is that he ticked the box 'No' against question 3.1 that the deceased was not diagnosed with any disease or any condition such as high blood pressure or diabetes after he interviewed the deceased and that he filled in the proposal form based on statements from the deceased and that he explained the terms to the deceased which would include the declaration. This then was the communication from the deceased to Rizal which was in turn communicated to the second defendant vide the proposal form. What in fact was communicated was that the deceased was not suffering from any illness in particular high blood pressure or diabetes.

**[21]** *United Oriental Assurance* was a situation where what was communicated to the insurance company through the agent, one Pany, was there had been an earlier mishap to the insured vessel. It was in that factual matrix the court stated that knowledge of the agent is equated to that of the insurance agent. In our instant case there was no evidence that Rizal knew the deceased was suffering from any illness when the deceased signed the proposal form. On the contrary the evidence was that Rizal filled in the form based on answers from the deceased.

**[22]** As to Rizal being the agent, in *United Oriental Assurance* it was stated at p 427 that Pany (the agent) was acting as agent for the owner of the insured vessel in so far as he assisted the former in completing the proposal form. In that sense too Rizal can be said to be the deceased's agent in filling up the proposal form and nothing more.

**[23]** Accordingly the deceased had at the time of signing the proposal from stated she had not been diagnosed or treated for high blood pressure or diabetes. She had further declared she was in good physical health and agreed that if she had not declared her state of health truthfully, the second defendant had the right to cancel the takaful coverage.

*Medical condition prior to the proposal form*

**[24]** The evidence in the form of Part A documents showed that the deceased had in fact been suffering from and treated for diabetes and/or hypertension prior to the proposal form being completed on 26 December 2011. These are as below:

(a) the medical history statement dated 13 September 2013 completed by Dr Rozita Zakaria of Klinik Kesihatan Pasir Gudang (F/52–57) confirming, amongst others, that:

(i) the deceased had first become her patient on 13 May 2010 where her clinical finding/diagnosis was 'uncontrolled diabetes with bilateral lower limb oedema' (Q1, Q2 and Q7), but the deceased had been suffering from diabetes and/or swollen legs due the diabetes since 2009 (Q5 and Q13);

(ii) the deceased had been advised to take insulin as a method of treating diabetes but refused to do so on 13 May 2010 (Q3);

(iii) the deceased then started on insulin on 8 June 2010 (Q4);

(iv) the deceased complained to the doctor that insullin injection pen had spoilt on 22 February 2011 and the doctor subsequently adjusted her insullin dosage (Q4); and

(v) the deceased was diagnosed to suffer from hypertension on 12 February 2009 and was given medication for it (see Q12 and Q13);

(b) the death claim form completed by the deceased's employer at the material time (F/30–51) shows that the deceased had submitted numerous medical certificates (MC) due to her diabetes and/or hypertension condition since 2010:

(i) the MC from Poliklinik Rozikin dated 3 May 2010 shows that the deceased was given two days medical leave due to high blood pressure (F/33);

(ii) the MC from Klinik Cempaka dated 6 April 2011 shows that the deceased was given one day medical leave due to diabetes (F/35);

(iii) the MC from Poliklinik Penawar dated 26 April 2011 shows that the deceased was given two days medical leave due to hypertension (F/36);

(iv) the MC from KPJ Johor Specialist Hospital dated 7 July 2011 shows that the deceased was given ten days medical leave due to diabetic retinopathy (F/38 top), and again on 15 July 2011 for another 31 days medical leave for right eye vitrectomy surgery (F/38 bottom).

Diabetic retinopathy is a comman diabetes complication that affects the eyes while vitrectomy surgery is used to treat diabetic retinopathy (Q&A 7(iv) WSD1(D2));

(v) the MC from Hospital Pusrawi Sdn Bhd dated 11 August 2011 was given for 19 days of medical leave due to the right eye vitrectomy surgery (F/39);

(vi) the MC from KPJ Johor Specialist Hospital shows that the deceased was given 36 days medical leave due to diabetic detachment (F/40 top).

This is a common diabetes complication which causes spots floating in the patient's vision, flashes of light or severe vision loss (Q&A 7(vi) WSD1(D2)); and

(vii) the MC from Hospital Pusrawi Sdn Bhd dated 6 October 2011 shows that the deceased was given another 12 days medical leave due to poor vision due to diabetic retinopathy (F/40 bottom).

**[25]** Aside from being Part A documents there was also DW1(D2)'s evidence in WSD1(D2) explaining the same. These were not challenged by the plaintiffs counsel during trial and are therefore taken as being true and binding.

**[26]** The fact that the deceased had been suffering from diabetes and high blood pressure since before the completion of the proposal form was also admitted by PW1. These can be seen in NOP/24–26, 30, 31 and 33. Hence for instance, the evidence of PW1 shows as follows:

D2 Counsel: Puan sila rujuk kepada sijil cuti sakit yang sebelah bawah pada muka surat 38 ini sijil cuti sakit yang dikeluarkan oleh Hospital Pusrawi Sdn Bhd kepada arwah yang sahkan bahawa yang memberikan 31 hari suti sakit sejak 12-7-2011 hingga 11-8-2011 kerena right eye detraction surgery, saya cadangkan bahawa arwah telah pun diberi sijil cuti sakit selama 31 hari dalam tahun 2011 antara 12 Julai hingga 11 August atas alasan pembedahan atas mata kanan arwah disebabkan komplikasi kencing manis, Puan setuju, tak setuju ataupun tak tahu?

PW1: Saya tahu.

(NOP/24)

D2 Counsel: Puan rujuk pada muka surat 40 sijil cuti sakit yang terdapat di atas yang dikeluarkan oleh Hospital KPJ Johor Specialist saya mencadangkan bahawa berdasarkan sijil perubatan ini arwah telah pun diberikan cuti sakit selama 36 hari akibat kompilasi kencing manis dalam bulan September 2011 adakah puan setuju atau tidak setuju?

PW1: Ya

D2 Counsel: Sila rujuk kepada sijil cuti sakit yang di bahagian bawah muka surat 40 yang ini sijil cuti sakit yang dikeluarkan oleh Hospital Pusrawi yang bertarikh

6-10-2011 sijil ini mengesahkan bahawa arwah diberikan 12 hari cuti sakit dalam bulan oktober tahun 2011 atas alasan kencing manis mata penglihatan yang kurang disebabkan kencing manis adakah Puan setuju atau tak setuju?

PW1: Ya

D2 Counsel: Saya cadangakan bahawa arwah sendiri juga tahu bahawa penglihatan beliau memang kurang disebabkan penyakit kencing manis pada masa itu?

PW1: Ya.

(NOP/25–26)

D2 Counsel: Jadi saya cadangkan berdasarkan pernyataan Doktor ini keadaan bengkak kaki arwah tersebut adalah akibat penyakit kencing manis adakah Puan setuju tak setuju Puan tahu kan?

PW1: Tahu.

D2 Counsel: Puan tahu ya kaki bengkak sebab penyakit kencing manis ya? Saya cadangakan arwah sendiri juga tahu?

PW1: Tahu.

(NOP/30)

**[27]** It is trite law that admissions are the strongest evidence possible. In *Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740 at p 752:

> Admission are the strongest evidence possible and even a wrong construction of document will be assumed to be correct in view of the admission.

**[28]** All the above evidence point towards the deceased suffering from high blood pressure and diabetes before she signed the proposal form. These facts had not been disclosed to or misrepresented to the second defendant at the time of the proposal such that the second defendant issued the takaful certificate in favour of the deceased.

CONSEQUENCE OF NON-DISCLOSURE

**[29]** A contract of insurance including takaful is a contract of *uberrimae fidei* (of good faith) and any suppression or non disclosure of material facts by the proposer will entitle the insurance company to avoid the contract. *National Insurance Co Ltd v S Joseph* [1973] 2 MLJ 195, *Goh Chooi Leong v Public Life Assurance Co Ltd* [1964] 1 MLJ 5 and *Tan Mooi Sim & Anor v United Overseas Bank (M) Bhd & Anor* [2011] 8 MLJ 556; [2011] 6 CLJ 937 would support this proposition.

**[30]** Thus for instance in *National Insurance*, it was stated at p 197:

> I am of the opinion that a contract of insurance is a contract of utmost good faith. Any suppression or non-disclosure of material facts by the proposer will entitle the

insurance company avoid the contract. A fact is material if it would influence the judgment of prudent or reasonable insurer in fixing the premium or determining the risk.

**[31]** Further, in *Tan Mooi Sim* it was stated at p 564 (MLJ); p 944 (CLJ):

It was also trite law that because a contract of insurance is a contract of uberrimae fides or of the outmost good faith, there is a duty on the person who wants to be insured to disclose all the is relevant to the insurer's decision whether to accept the risk being proposed ...

In *Ivamy's General Principles of Insurance Law* (5th Ed) it is stated at p 122:

> It is the duty of the proposed assured to disclosed to the insurers all material facts within his actual knowledge. The special facts distinguishing the proposed insurance are, as general rule, unknown to the insurers who are not in a position to ascertain them. They lie, for the most part, solely within the knowledge of the proposed assured.

**[32]** The non-disclosure of facts pertaining to her medical condition, coupled with the declaration if she had not declared her state of health truthfully the second defendant would have the right to cancel the takaful coverage, meant the takaful contract could be avoided.

WHETHER NEW TERM OF CONTRACT

**[33]** The allegation of the second defendant asking for the medical records and information of the deceased after her death and this was a new term of contract was without merit. Reference to *Seah Cheoh Wah v Malayan Banking Bhd & Anor* [2014] 2 MLJcon 173; [2009] 7 CLJ 485 was made. At p 178 (MLJ); p 490 (CLJ) this was stated:

... the MRTA form and the official receipt did not in any way subject the deceased to a medical check up before the issuance of the MRTAP. To my mind the requirement for a medical examination was imposed after the contract of assurance had come into force. The requirement cannot be viewed as a term of the contract. Therefore, based on the facts as presented in the present case and under the circumstances there was a valid contract of assurance concluded when the second defendant accepted payment of the premium from the 1st defendant on 24 June 1997. The evidence points to this: the requirement for the deceased to undergo a medical check up was made after the contract had been concluded. Therefore, the non payment by the second defendant in respect of the benefit under the MRTAP would amount to a breach of the contract.

**[34]** The facts in *Seah Cheoh Wah* were that a medical check up was required after the conclusion of the contract to which the court found it to be a new requirement. Here, there was no such requirement but only a request for medical records and information in the face of the deceased stating in her

proposal form she did not suffer from any illness such as high blood pressure or diabetes. Such a request was for the second defendant to support its defence of non-disclosure. On there being a valid contract after the acceptance of premium, this was the correct position in law, except that in this case the second defendant seeks to avoid the contract on non-disclosure.

CONCLUSION

**[35]** For the above reasons, the plaintiffs claim against the second defendant and the first defendant was dismissed, with costs.

*Plaintiffs' claim dismissed.*

Reported by Ashok Kumar